Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1795

JEROME C. BLAIR - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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May 12, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

JEROME C. BLAIR - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, JEROME C. BLAIR, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the Supreme Court of Kentucky entered in this proceeding on November 20, 1979.

OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky is reported at 592 S. W. 2d 132 (1980). A Petition for Rehearing was filed and the Commonwealth was ordered to respond. The Order of the Supreme Court overruling Petitioner's Petition for Rehearing was entered on February 12, 1980. (Appendix E, p. 34).

JURISDICTION

The Order of the Supreme Court of Kentucky was entered on November 20, 1979, and a timely Petition for Rehearing was denied by Order of the Supreme Court of Kentucky on February 12, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether retroactive application of a substantially different preservation of error rule is constitutionally permissible.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Article I, Section 10 of the Constitution of the United States provides in pertinent part:

> [cl. 1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coins a Tender in Payment of Debts; pass any Bill of

Attainder, *ex post facto law,* or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

This case was tried by a jury in the Jefferson Circuit Court of Louisville, Kentucky on June 28, 29, 30 and July 1, 2, 1976. There were three defendants in the within action: STEPHEN BORDERS, RICHARD CARPENTER, AND JEROME BLAIR. This Writ of Certiorari is brought by JEROME BLAIR. Another Writ of Certiorari has been brought at this time by CARPENTER and BORDERS. The Petitioner was charged in a twelve count Indictment with having fired shots into automobiles and business places on the west side of Louisville, injuring persons and property. (Transcript of Record, hereinafter designated as T.R., p. 2). After over fourteen hours of deliberation, the jury found the Petitioner guilty of two counts of wanton endangerment in the first degree and two counts of criminal mischief in the third degree and fixed his sentence at one year in the penitentiary. (Transcript of Evidence, hereinafter designated as TE., pp. 812-813).

The Petitioner perfected a timely appeal to the Court of Appeals. On the 10th day of February, 1978, that Court rendered its opinion which reversed the conviction and ordered that a new trial be granted with directions that if the evidence for the Commonwealth was substantially the same that a directed verdict in favor of the Petitioner be entered. (Appendix A, p. 11).

On June 30, 1978, the Court of Appeals withdrew its original opinion and issued a new opinion. The Court held that where all the evidence is circumstantial, the lack of conclusiveness of a gun powder residue test left the Court with no alternative but to reverse the conviction. (Appendix B, p. 16).

On November 14, 1978, the Supreme Court of Kentucky granted the Commonwealth's Motion for Discretionary Review to review the June 30, 1978 decision of the Court of Appeals.

In a Memorandum Opinion Per Curiam rendered on June 12, 1979, the Kentucky Supreme Court affirmed the Court of Appeals' opinion reversing the conviction of CARPENTER and BORDERS but reversed the Court of Appeals Opinion regarding Petitioner BLAIR. That Court held that because of a recent Kentucky Decision, *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) the Petitioner had failed to properly preserve the error regarding sufficiency of evidence by failing to make a motion for directed verdict of acquittal at the close of all the evidence and thus since there was some relevant evidence linking BLAIR to the crime his conviction must stand. (Appendix C, p. 25).

Petitioner filed a Petition for Rehearing in the Kentucky Supreme Court and the Commonwealth filed a Petition for Rehearing in the cases involving CARPENTER and BORDERS. The Supreme Court granted the Commonwealth's Petition for Rehearing and issued a new opinion rendered on November 20, 1979 which completely reversed the decision of the Court of Appeals and upheld all three convictions. The Court

reasoned that since the parties had failed to move for a directed verdict at the close of all the evidence, the issue of the sufficiency of the evidence was, therefore, not preserved for Appellate Review, regardless of the quantity or quality of the evidence. (Appendix D, p. 30).

Petitioner BLAIR, and CARPENTER and BORDERS filed Petitions for Rehearing which were denied on February 12, 1980.

REASON FOR GRANTING THE WRIT

It is constitutionally impermissible for the Supreme Court of Kentucky to retroactively apply a substantially different preservation of error rule. The Supreme Court of Kentucky ruled that Petitioner BLAIR and his co-defendants CARPENTER and BORDERS were precluded from raising a sufficiency of the evidence issue before the Appellate Court due to the fact that they failed to make a Motion for Directed Verdict at the close of all the proof. The parties had made such a motion at the close of the prosecution's case when it ought to have been granted. Further, the sufficiency of evidence is argued at length in a Motion for New Trial when the trial judge stated that he would have directed a verdict had he felt it was justified. The Supreme Court's decision was based on a 1977 Kentucky case, *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977). *Kimbrough* held that a sufficiency of evidence issue was not preserved if a Motion for Directed Verdict was not made at the close of the

prosecution's case, the close of the defendant's case, and at the close of any rebuttal. The present case, was tried in 1976. Thus, *Kimbrough* case was not cited until well after the Petitioner's trial.

It should be noted at this point, that *Kimbrough's* procedural rule presented a clear departure from the customary procedure preserving the question of the sufficiency of the evidence that was *in effect* at the time of Petitioner's trial. In writing the opinion of the Supreme Court of Kentucky rendered on November 20, 1979, Justice Clayton noted that prior to *Kimbrough* the state of the law on that issue was uncertain, and that the decision in *Kimbrough* was a clarification of the procedural rule for preserving the sufficiency of the evidence question. (Appendix D, p. 30). Hence, it was not until April 1, 1977, some nine months after the Petitioner's trial, that a definitive statement on this particular point of criminal procedure was established by Supreme Court of Kentucky. In short, it was not until well after the Petitioner's trial that attorneys were given notice of the new manner in which the sufficiency of the evidence issue could be preserved for appellate review.

The law in effect prior to *Kimbrough,* at the time of Petitioner's trial, required only that a Motion for Directed Verdict of Acquittal be made at the close of the Commonwealth's case in order to preserve the sufficiency of the evidence issue. In a separate opinion written by Chief Judge Martin concurring with the decision rendered by the Kentucky Court of Appeals on February 10, 1978, it was noted, that *Kimbrough*

indeed represented a clear departure from prior law in the Commonwealth of Kentucky. He stated that the question of the sufficiency of the evidence could have been preserved at the time of the trial by a Motion for a Dircted Verdict at the close of the Commonwealth's case or at the close of all the evidence, or even in a Motion for a New Trial. (Appendix D, p. 30).

As stated before, Counsel first moved for a directed verdict at the close of the Commonwealth's case and then raised a question of the sufficiency of the evidence in a Motion for a New Trial. In short, counsel had complied with all the mandatory procedures for preserving the sufficiency of the evidence question that were in effect at the time of Petitioner's trial. Yet, Petitioner has been penalized and made to suffer a manifest injustice as a result of following the very standards described by the Courts of Kentucky at the time of their trial for preserving the sufficiency of the evidence question. Said penalty is contrary to the basic concept of fundamental fairness and Due Process of Law and, cannot constitutionally stand.

In a recent case, United States Court of Appeals for the Sixth Circuit has relied on the reasoning employed by this Court in *O'Connor* v. *Ohio,* 385 U. S. 92, 17 L. Ed. 2d 189, 87 S. Ct. 252 (1966) and held that when a retroactive application of an opinion of the Court substantially changes the law, due process mandates that a defendant cannot be charged with anticipating the new change in the law. *Isaac* v. *Engle,* —— F. 2d ——, No. 78-3488 (6th Cir., Feb. 8, 1980).

The retroactive application of *Kimbrough* is also violative of the due process clause since it operates precisely like an ex post facto law. In a concurring opinion written by Chief Judge Martin of the Kentucky Court of Appeals, it was pointed out, that since the *Kimbrough* rule effected the Petitioner's substantial rights, its application operated precisely like an ex post facto law which is prohibited by Article I, §10 of the Constitution of the United States. (Appendix B, p. 16).

This Court has held that a statute which takes from the defendant a substantial right is said to be ex post facto in nature, and, therefore, prohibited by the United States Constitution. *Thompson* v. *State of Utah,* 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061 (1898).

Clearly, if a State Legislature is barred from the ex post facto clause compassing such a procedural law, it must follow that a State Supreme Court is also barred by the Due Process Clause from achieving precisely the same result by judicial construction. *Bouie* v. *Columbia,* 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1963).

This Court has held that rules of procedure are devised to promote the ends of justice and not defeat them. Orderly rules of procedure do not require sacrifice of the rule of fundamental justice. *Hormel* v. *Helvering,* 312 U. S. 552, 85 L. Ed. 1037, 1941 (1940).

Obviously the ends of justice and fundamental fairness have been defeated by the Supreme Court's retroactive application of the procedural rule ennunciated active application of the procedural rule enunciated

in *Kimbrough*. Said application is contrary to the new constitutional mandate of *Jackson* v. *Virginia*, —— U. S. ——, 61 L. Ed. 2d 560 (1979). That new standard for acquittal allows for no exceptions or deviations and dictates that a conviction cannot be upheld where there is insfficient evidence to establish guilt. Procedural rules must remain flexible to guard against the very injustice that this Petitioner has suffered. Petitioner prays that this Court will grant the Writ of Certiorari and correct the grave injustice that has been done him.

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION RENDERED: FEBRUARY 10, 1978
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

File No. CA-568-MR

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From the Jefferson Circuit Court
Honorable Charles Leibson, Special Judge
Action No. 156577

REVERSING AND REMANDING

BEFORE: MARTIN, Chief Judge, COOPER and HOWARD, Judges.
COOPER, Judge. The appellants were convicted in Jefferson Circuit Court on two counts of wanton endangerment and two counts of third degree criminal negligence.

The trial and conviction of the appellants arose out of an incident in the early morning hours in the West end of Louisville, Kentucky, on the 30th and 31st of March, 1976. On that date, Slim's Grill located at 421 South 19th Street, Club Cobra located at 38th and Broadway Streets, and Victory Liquors located at 2600 West Jefferson Street in Louisville were peppered by shotgun fire. Several automobiles parked on the streets in the adjacent areas were also peppered with the shot. A waitress in Slim's Grill

was severely injured with a wound in the head. She suffered brain damage and blindness to the extent of being mentally incompetent, and therefore was unable to testify at the appellants' trial.

The appellants were police officers for the Louisville Police Department and were off-duty during the night and early morning of March 30th and 31st, 1976. All were indicted in a twelve (12) count indictment.

The testimony of the various witnesses is lengthy and sometimes contradictory, but for the purpose of this opinion a statement of the basic facts will be given.

The appellants, Blair, Borders and Carpenter, left a meeting of the Fraternal Order of the Police at the Ramada Inn on Hurstborne Lane on March 30, 1976, between 8:30-9:00 p.m. and proceeded to the Willow Lake Inn in separate cars. They were accompanied by Richard Gary Dickenson, who testified at the appellants' trial. The four (4) police officers left the Willow Lake Inn in Sergeant Blair's car with Blair driving. Dickenson got out of the car at Watterson Expressway and Shelbyville Road after Blair refused to take Dickenson home. After dropping off Dickenson, the three proceeded to the Ramada Inn where Carpenter got his car and followed Borders and Blair to the Rooster Tail Bar on Chestnut Street in downtown Louisville. Sandra Stacey, a dancer at the Rooster Tail, identified the appellants at the Rooster Tail on March 30, 1976, at around 11:00-11:30 p.m. She sat at a table with them where they were having a drink. Following their drinks, the appellants all left together. Stacey testified that following her work and breakfast, she saw the appellant, Blair, at Gargotto's Liquor Store on Jefferson Street between 3:30-4:00 a.m. She told an investigating officer that she also saw the other two appellants, Borders and Carpenter, with Blair at the liquor store. At the trial however she stated that she only saw Blair at the liquor store during that time. Witnesses at Slim's Grill and the Club Cobra

identified the car from which the shootings came as a brown car that looked like an unmarked police car; consequently a teletype was put out for a brown car resembling a police car. Two spent 12-gauge shotgun shells were turned over to the Evidence Technician Unit after being found at the site of the shootings.

Sergeant Pete Giuchici testified that he investigated the shootings at the scene. As he proceeded in a westwardly direction away from the scene, after being advised by witnesses that they heard shots coming from that direction, he noticed a car coming toward him without headlights. Upon stopping the car, which was of a brown color, a voice came from within the car stating, "What's up, Pete?" By voice, Giuchici identified the speaker as appellant, Blair, and stated that there were two other white males in the car, and a 12-gauge shotgun was in the front end of the car. He could not identify the other two individuals. At the trial, Giuchici hedged as to the positive identity of Blair's voice.

A Harrison-Gilroy test for gunpowder residue was performed on Blair's car to determine whether shots had been fired from the automobile. Tests at the Kentucky State Police Crime Laboratory indicated that an unfired shotgun shell found at the Club Cobra had markings similar to the markings on the shells tested in one of Blair's guns.

We believe that the sole issue of merit before the Court is:

WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANTS?

It is a sound principle of law that a conviction may be sustained on circumstantial evidence. *Rogers* v. *Commonwealth,* Ky., 444 S. W. 2d 548 (1969); *Moore* v. *Commonwealth,* Ky., 446 S. W. 2d 217 (1969). The question then is whether the totality of the evidence was of such a nature that the judge could have concluded that reasonable minds

might fairly find guilt beyond a reasonable doubt. *Carmen* v. *Commonwealth,* Ky., 490 S. W. 2d 744 (1973); *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811 (1971). After a review of the evidence, we cannot say that the evidence is of such a nature and sufficiency to sustain the verdict of the jury.

The crux of the incriminating evidence submitted by the Commonwealth in this case revolves around the evidence that the defendants had recently fired a gun, notwithstanding the evidence that they were in the locality of the time it occurred.

The Commonwealth introduced evidence through an expert witness from the Kentucky State Police Laboratory who performed a Harrison-Gilroy test on the defendant Blair's car to determine whether or not a gun had recently been fired from the car. The purpose of the test is to find evidence of lead and barium which are two principal ingredients of gunpowder. The expert witness who performed the Harrison-Gilroy test testified that standard procedures for this test are as follows: Swabs of the area to be tested are saturated with hydrochloric acid and allowed to dry. Those swabs are sprayed with tartaric acid; then the swabs are sprayed with sodium rhodizonate. If lead is present it reacts with a red color and barium, if present, reacts with an orange color. Hydrochloric acid is again sprayed on the area. Lead then reacts with a blue color and the barium will turn to pink or red. The expert further testified that he had performed over 3,300 Harrison-Gilroy tests. The results of the tests in the present case revealed traces of lead, but no barium.

The admissibility of the Harrison-Gilroy test for discovering gunpowder residue is apparently not well established in Kentucky law. However, in this case, where this scientific test of recognized validity was performed competently under laboratory conditions, we cannot say that

the lower court abused its discretion in admitting the results of the test into evidence. *State* v. *Ross,* Mo., 523 S.W. 2d 841 (1975); *Commonwealth* v. *Sousa,* Mass., 215 N. E. 2d 910 (1966). The test for gunpowder residue in this case, however, was inconclusive at best. The absence of barium in the swabs taken from the defendant Blair's car leaves the jury with only an opportunity to speculate that a gun was actually fired from the defendant Blair's car.

Combined with more conclusive evidence, the Harrison-Gilroy test in question would not be determinative. Here, however, where all the evidence is circumstantial, the lack of conclusiveness of the test leaves the Court with no alternative but to reverse and remand to the lower court on grounds of insufficient evidence, and order that a new trial be granted with directions that if the evidence for the Commonwealth is substantially the same that a directed verdict in favor of the defendants be entered.

ALL CONCUR.

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APPENDIX B

OPINION RENDERED: FEBRUARY 10, 1978
ORIGINAL OPINION WITHDRAWN
AND REISSUED: JUNE 30, 1978
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

CA-568-MR

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - *Appellants*

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COMMONWEALTH OF KENTUCKY - - - *Appellee*

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also peppered with the shot. A waitress in Slim's Grill was severely injured with a wound in the head. She suffered brain damage and blindness to the extent of being mentally incompetent and, therefore, was unable to testify at the appellants' trial.

The appellants were police officers for the Louisville Police Department and were off-duty during the night and early morning of March 30th and 31st, 1976. All were indicted in a twelve (12) count indictment.

The testimony of the various witnesses is lengthy and sometimes contradictory, but for the purpose of this opinion a statement of the basic facts will be given.

The appellants, Blair, Borders and Carpenter, left a meeting of the Fraternal Order of the Police at the Ramada Inn on Hurstbourne Lane on March 30, 1976, between 8:30-9:00 P.M. and proceeded, in separate cars, to the Willow Lake Inn. They were accompanied by Richard Gary Dickenson, who testified at the appellants' trial. The four (4) police officers left the Willow Lake Inn in Sergeant Blair's car with Blair driving. Dickenson got out of the car at Watterson Expressway and Shelbyville Road after Blair refused to take Dickenson home. After dropping off Dickenson, the three proceeded to the Ramada Inn where Carpenter got his car and followed Borders and Blair to the Rooster Tail Bar on Chestnut Street in downtown Louisville. Sandra Stacey, a dancer at the Rooster Tail, identified the appellants at the Rooster Tail on March 30, 1976, at around 11:00-11:30 P.M. She sat at a table with them where they were having a drink. Following their drinks, the appellants all left together. Stacey testified that following her work and breakfast, she saw the appellant Blair at Gargotto's Liquor Store on Jefferson Street between 3:30-4:00 A.M. She told an investigating officer that she also saw the other two appellants, Borders

and Carpenter, with Blair at the liquor store. At the trial, however, she stated that she only saw Blair at the liquor store during that time. Witnesses at Slim's Grill and the Club Cobra identified the car from which the shootings came as a brown car that looked like an unmarked police car; consequently a teletype was put out for a brown car resembling a police car. Two spent 12-gauge shotgun shells were turned over to the Evidence Technician Unit after being found at the site of the shootings.

Sergeant Pete Giuchici testified that he investigated the shootings at the scene. As he proceeded in a westwardly direction away from the scene, after being advised by witnesses that they heard shots coming from that direction, he noticed a car coming toward him without headlights. Upon stopping the car, which was of a brown color, a voice came from within the car stating, "What's up, Pete?" By voice, Giuchici identified the speaker as appellant Blair, and stated that there were two other white males in the car, and a 12-gauge shotgun was in the front end of the car. He could not identify the other two individuals. At the trial, Giuchici hedged as to the positive identity of Blair's voice.

A Harrison-Gilroy test for gunpowder residue was performed on Blair's car to determine whether shots had been fired from the automobile. Tests at the Kentucky State Police Crime Laboratory indicated that an unfired shotgun shell found at the Club Cobra had markings similar to the markings on the shells tested in one of Blair's guns.

We believe that the two issues before us are the sufficiency of the evidence and the admission of the results of the Harrison-Gilroy test.

WAS THERE SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT?

It is a sound principle of law that a conviction may be sustained on circumstantial evidence. *Rogers* v. *Common-*

wealth, Ky., 446 S. W. 2d 217 (1969). The question then is whether the totality of the evidence was of such a nature that the judge could have concluded that reasonable minds might fairly find guilt beyond a reasonable doubt. *Carmen* v. *Commonwealth,* Ky., 490 S. W. 2d 744 (1973); *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811 (1971). After a review of the evidence, we cannot say that the evidence is of such a nature and sufficiency to sustain the verdict of the jury.

The crux of the incriminating evidence submitted by the Commonwealth in this case revolves around the evidence that the defendants were in the locality where the offense occurred and that a gun was recently fired in the car.

HARRISON-GILROY TEST RESULTS

The Commonwealth introduced evidence through an expert witness from the Kentucky State Police Laboratory who performed a Harrison-Gilroy test on the defendant Blair's car to determine whether or not a gun had recently been fired from the car. The purpose of the test is to find evidence of lead and barium which are two principal ingredients of gunpowder. The expert witness who performed the Harison-Gilroy test testified that standard procedures for this test are as follows: Swabs of the area to be tested are saturated with hydrochloric acid and allowed to dry. Those swabs are sprayed with tartaric acid; then the swabs are sprayed with sodium rhodizonate. If lead is present, it reacts with a red color and barium, if present, reacts with an orange color. Hydrochloric acid is again sprayed on the area. Lead then reacts with a blue color, and the barium will turn to pink or red. The expert further testified that he had performed over 3,300 Harrison-Gilroy tests. The tesults of the tests in tre present case revealed traces of lead, but no barium.

The admissibility of the Harrison-Gilroy test for discovering gunpowder residue is apparently not well established in Kentucky law. If, however, as was not true in this case, a scientific test of recognized validity was performed competently under laboratory conditions, we cannot say that it was a lower court abuse of discretion to admit the results of the tests into evidence. *State* v. *Ross,* Mo., 523 S. W. 2d 841 (1975); *Commonwealth* v. *Sousa,* Mass., 215 N. E. 2d 910 (1966). The test for gunpowder residue in this case, however, was inconclusive at best. The absence of barium in the swabs taken from the defendant Blair's car leaves the jury with only an opportunity to speculate that a gun was actually fired from the defendant Blair's car.

Combined with more conclusive evidence, the Harrison-Gilroy test could be determinative. Here, however, where all the evidence is circumstantial, the lack of conclusiveness of the test leaves the court with no alternative but to reverse the conviction of these appellants.

The judgment of the circuit court is reversed.

MARTIN, CHIEF JUDGE, CONCURS BY SEPARATE OPINION.

HOWARD, JUDGE, DISSENTS BY SEPARATE OPINION.

MARTIN, CHIEF JUDGE, CONCURRING. I fully concurred with the conclusion of this panel when our original opinion was issued on February 10, 1978. However, in the Commonwealth's petition for rehearing, a new issue has been raised. The purpose of this concurrence is to explain my position in regard to this argument and to answer the dissenting opinion of my associate judge.

The Commonwealth argues in their petition for rehearing that the panel overlooked the decision in *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977), and *Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977). I do not believe that the panel overlooked either of these decisions.

It is my opinion that either of these decisions is applicable to the present case. The decisions in these cases require that a motion for a judgment of acquittal must be made at the conclusion of all the proof in order for the appellate court to review the sufficiency of the evidence on appeal. In the present case, the record indicates that the defense attorneys did not make a motion for a directed verdict at the conclusion of all the proof. They did test the sufficiency of the evidence in a motion for a new trial.

The argument of the Commonwealth is that under *Kimbrough* and *Long* we are foreclosed from the consideration of the issue of the sufficiency of the evidence as to the guilt of these appellants. I do not believe these decisions were intended to be held retroactively. The decisions in both of these cases were issued after the trial in the present case. As was held in *Pendleton* v. *Pendleton,* Ky., 560 S. W. 2d 538 (1978), retroactivity will not be applied except when a specific dispositive issue was in litigation at the time of the controlling decision.

Furthermore, *Kimbrough* represents a clear departure from prior law in this Commonwealth. Proviously, a question of sufficiency of evidence could have been preserved either by a motion for directed verdict at the close of the Commonwealth's case, or at the close of all the evidence, or even in a motion for a new trial. *See Crain* v. *Commonwealth,* Ky., 484 S. W. 2d 839, 842 (1972); Civil Rule 61.02, made applicable to criminal cases pursuant to Criminal Rule 13.04; *Stone* v. *Commonwealth,* Ky., 456 S. W. 2d 43, 44 (1970).

Inasmuch as *Kimbrough* marks a clear departure from prior law and since appellant could not have had notice of the change, it would be fundamentally unfair to apply this newly created preservation of error rule to the facts and circumstances of this case. Since this procedural change would significantly affect appellant's substantial rights, it

"operates precisely like an *ex post facto* law, such as Art. I §10 of the [federal] Constitution forbids." *Bouie* v. *City of Columbia,* 378 U. S. 347, 353, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). *See also:* Kentucky Constitution, §19.

While I agree that on the sufficiency of evidence issue a motion for a judgment of acquittal at the conclusion of all the evidence would seem to be appropriate, I think that this is a very technical approach to the law. *Kimbrough,* in my opinion, does not supersede principles of due process and certainly in the present case, based on our earlier opinion, it would create a technical deficiency only, rather than a substantive issue. In the present case, certainly the error is the failure of the Commonwealth to prove beyond a reasonable doubt that these appellants committed the offense with which they were charged. The duty of an appellate court to insure that the appellants receive a fair trial cannot be foreclosed by a mere technicality.

It may be that the controlling authorities in this case would be those decisions, such as *Vachon* v. *New Hampshire,* 414 U. S. 481 (1974), in which the United States Supreme Court stated:

> It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Id.,* 414 U. S. at 480.

In the present case, the record would appear to lack any relevant evidence to prove the defendants' presence at the scene of the offense.

Howard, Judge, Dissenting. I respectfully dissent from the majority in this case. In the first place, the majority opinion should have dealt with the recent case of *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977). The Supreme Court held therein that a motion for directed verdict made only at the close of the Commonwealth's evi-

dence and not renewed at the conclusion of all the evidence does not preserve for review the question of the sufficiency of the evidence to convict. This holding was followed by the Supreme Court in the case of *Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977). In the case at bar, in the *Kimbrough* case, and in the *Long* case, motions for directed verdict were made at the conclusion of the Commonwealth's evidence and in the case at bar the motions were sustained as to several counts of the indictments. However, in all three of these cases no motions were made at the conclusion of all the evidence and, therefore, the alleged errors were not preserved for review on appeal. In *Kimbrough* and *Long* the convictions were affirmed, and I think we should do likewise in this case.

In addition, there was sufficient evidence to convict, in my opinion, even in the absence of the evidence in regard to the Harrison-Gilroy test. In view of the fact that it was admitted that shots had been fired from Blair's car on a hunting trip, it does not appear that the test would be too important anyway. It was for the jury to determine the reason guns were fired from Blair's car.

There was, of course, conflicting evidence with some of the Commonwealth's witnesses changing their testimony, but the evidence of their prior inconsistent statements was entitled to be submitted to the jury as substantive evidence. *Jett* v. *Commonwealth,* Ky., 436 S. W. 2d 788 (1960).

If, under the evidence as a whole, it would not be clearly unreasonable for the jury to find the defendants guilty, they are not entitled to a directed verdict of acquittal even if the motions had been properly made. *Trowel* v. *Commonwealth,* Ky., 550 S. W. 2d 530 (1977). There was sufficient evidence of probative value to sustain the convictions.

I would affirm the judgment of the lower court.

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APPENDIX C

RENDERED: JUNE 12, 1979

SUPREME COURT OF KENTUCKY

78-SC-365-DG

COMMONWEALTH OF KENTUCKY - - - *Movant*

v.

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - *Respondents*

On Review from the Court of Appeals
CA-568-MR
(Jefferson Circuit Court No. 156577)

MEMORANDUM OPINION PER CURIAM—AFFIRMING IN PART; REVERSING IN PART

This case involves an incident in the early morning hours of March 31, 1976, in which two establishments in Louisville's West End, Slim's Grill (19th and Cedar) and Club Cobra (38th and Broadway), were peppered with gunfire from a moving car. Lubertha Pugh, a waitress at Slim's Grill, was seriously injured by the gunfire, sustaining brain damage and blindness. Respondents Blair, Carpenter and Borders, three Louisville police officers, were found guilty of two counts of wanton endangerment and two counts of third-degree criminal mischief and sentenced to imprisonment for one year. The judgments of the Jefferson Circuit Court were reversed by a divided

panel of the Court of Appeals, which held that the evidence was not sufficient to support the convictions. We granted discretionary review.

We begin with a summary of the facts based upon our review of the record. Blair, Borders and Carpenter attended an FOP meeting at Ramada Inn (I-64 and Hurstbourne Lane) on the night of March 30. Accompanied by Officer Dickinson, respondents left the meeting about 8:30 and went to the Willow Lake Inn (La Grange Road near Anchorage), taking Blair's and Borders' cars. After about and hour the four left in Blair's car. Dickinson was dropped off at Shelbyville Road and Watterson Expressway around 11:00. Respondents then drove back to Ramada Inn, where Carpenter picked up his car and followed Blair and Borders downtown to the Rooster Tail (Chestnut Street). Sandra Stacy, a dancer at the Rooster Tail, saw the trio arrive between 11:00 and 11:30 and sat with them as they drank beer. Respondents left between 12:30 and 1:00 a.m.

The shooting at Slim's Grill occurred about 1:15; the Club Cobra shooting followed about 1:30. A police teletype was put out for a brown car resembling a police car that was seen leaving the scene at Club Cobra. Sgt. Pete Giuchici was investigating the Slim's Grill shooting when the Club Cobra call came on the radio. He headed west in the direction of Club Cobra and spotted a car traveling toward him with its headlights off. Giuchici stopped the oncoming car, and the front-seat passenger said, "What's up, Pete?" Giuchici identified the voice as that of respondent Blair. Giuchici also observed two unidentified white males and a shotgun in the car.

Betty Houchins, Blair's girl friend, told the grand jury that Blair told her he was stopped in the West End. At trial, however, she testified that Blair told her the police said he was stopped in the West End. In addition, Sgt. Browder, who investigated the case against respondents,

testified that Blair had mentioned in a conversation with him that he had a legitimate reason for being in the West End. Blair denied making the statement.

An expert who performed a Harrison-Gilroy test on Blair's car found traces of lead, but no barium or antimony. He testified that the results were consistent with the discharge of a firearm, close proximity of a firearm, or having held a firearm not recently cleaned. A number of police officers testified that they had shot groundhogs from Blair's car. Another expert expressed his opinion that a spent .12-gauge shotgun shell found near Club Cobra had been chambered in, but not fired from, a shotgun owned by Blair.

Sandra Stacy told investigating officers that she saw Blair at Gargotto's, a downtown (Second and Jefferson) liquor store on her way home from work between 3:30 and 4:00 and that he got into a dark car in which his two companions from the Rooster Tail were sitting. At trial, however, she testified that Blair was definitely alone when she saw him.

Borders testified that he left the Rooster Tail with Blair and went to the Fish Bowl (1700 Preston). They left between 1:00 and 1:30, and Blair drove him back to the Willow Lake Inn to get his car. During the investigation Borders told Sgt. Browder that he passed out in his car and never left the Willow Lake Inn. At trial Borders explained that he lied to Browder at the time because he didn't want his wife to know he had been at the Rooster Tail.

Blair testified that he left the Rooster Tail with Borders, went to the Fish Bowl, took Borders to the Willow Lake Inn, returned downtown to buy beer at Gargotto's, and went to Betty Houchins' apartment where he slept on the couch.

Carpenter testified that he went home after leaving the Rooster Tail. Officer Warman, who lived in the same apartment building as Carpenter, told the jury that he borrowed some records from Carpenter between 1:00 and 2:00.

The Commonwealth argues on this appeal that there was sufficient evidence to convict respondents, and that in any event the issue was waived by the failure of respondents to move for a directed verdict at the close of all the evidence, citing *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977).

The Supreme Court of the United States has held that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Vachon* v. *New Hampshire,* 414 U. S. 478, 480 (1974). We are of the opinion that the record before us contains no relevant evidence linking Carpenter and Borders to the charged offenses. It follows that their convictions amounted to a denial of constitutional rights which could not be waived under *Kimbrough.* The Court of Appeals correctly ruled that the evidence was insufficient to convict Carpenter and Borders.

The Court of Appeals erred, however, with respect to Blair. Blair was identified in the vicinity of the shootings shortly after they occurred in a car with its lights off which contained a shotgun. The record contains relevant evidence against Blair, and *Vachon* is therefore inapplicable. *Kimbrough* forecloses Blair from raising the sufficiency of the evidence before an appellate court.

That part of the opinion of the Court of Appeals reversing the convictions of Carpenter and Borders is affirmed. That part of the opinion dealing with Blair is reversed, thereby affirming the judgment of the Jefferson Circuit Court against him.

All concur.

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APPENDIX D

SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, - - - *Movant,*

v.

JEROME BLAIR,
RICHARD CARPENTER and
STEPHEN BORDERS, - - - - - *Respondents.*

OPINION

Nov. 20, 1979.
Rehearing Denied Feb. 12, 1980.

Defendants were convicted before the Jefferson Circuit Court on two counts of wanton endangerment and two counts of third-degree criminal mischief, and they appealed. The Court of Appeals reversed, holding that the evidence admitted at trial was insufficient to support the jury's verdict, and a petition for discretionary review was granted. The Supreme Court affirmed as to two respondents but reversed with respect to the third. Upon granting petitions for rehearing, the Supreme Court, Clayton, J., held that under the *Kimbrough* rule, defendants failed to preserve for appellate review the issue of sufficiency of the evidence where they failed to move for a directed verdict at the close of all the evidence.

Opinion of Court of Appeals reversed; judgments of conviction affirmed.

1. Criminal Law—Key 1044.1(7)

In order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use insufficiency as a basis for his appeal must have moved

for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case-in-chief.

2. Criminal Law—Key 1044.1(7)

If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury.

3. Criminal Law—Key 1044.1(7)

Insufficiency of the evidence to support a verdict must be timely raised in the trial court, ordinarily by a motion for a directed verdict, in order for the question to be reviewable on appeal.

4. Criminal Law—Key 1044.1(7)

Under the *Kimbrough* rule, defendants failed to preserve for appellate review the issue of sufficiency of the evidence where they failed to move for a directed verdict at the close of all the evidence.

5. Courts—Key 89

Judicial consistency must be observed in order to maintain a responsible and efficient court system.

Robert F. Stephens, Atty. Gen., Martin Glazer, Asst. Atty. Gen., Frankfort, for movant.

John Tim McCall, Louisville, for respondent Blair.

Frank E. Haddad, Jr., Louisville, for respondent Carpenter.

Robert E. Fleming, Louisville, for respondent Borders.

CLAYTON, Justice.

Over three years ago, respondents, Blair, Carpenter and Borders, Louisville police officers at the time, were convicted of two counts of wanton endagerment and two counts of third-degree criminal mischief and sentenced to one year's imprisonment. The Court of Appeals reversed the

convictions, holding that the evidence admitted at trial was insufficient to support the jury's verdict. This court granted the Commonwealth's petition for discretionary review and in an opinion issued last June, affirmed the decision of the Court of Appeals as to respondents Carpenter and Borders but reversed that court's decision with respect to respondent Blair.

Petitions for rehearing were submitted by both sides and after careful consideration we now find it necessary to completely reverse the decision of the Court of Appeals and to uphold the judgments of the Jefferson Circuit Court.

[1–3] We rely substantialy on two recent cases, *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) and *Rudolph* v. *Commonwealth,* Ky., 564 S. W. 2d 1, *cert. denied,* 439 U. S. 1004, 99 S. Ct. 616, 58 L. Ed. 2d 680 (1978). The procedural rule, as clarified in *Kimbrough,* is that in order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use the insufficiency as a basis for his appeal must have moved for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case in chief. The rationale behind this rule being that: "If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury." *Kimbrough,* 550 S. W. 2d at 529. Furthermore, "[w]e have held consistently that insufficiency of the evidence to support a verdict must be timely raised in the trial court—ordinarily by a motion for a directed verdict . . . in order for the question to be reviewable on appeal. *Rudolph,* 564 S. W. 2d at 4. *See e. g., Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977) and *Butler* v. *Commonwealth,* Ky., 560 S. W. 2d 814 (1977).

[4, 5] Since respondents failed to move for a directed verdict at the close of all the evidence, the *Kimbrough* rule must be applied as we perceive no reason to retract from this position. We must remain firm in our adherence to specified procedure because "an appellate hearing is conditioned upon compliance with essential rules, without which this Court could not effectively conduct its business. It is our duty to enforce those rules as a part of the judicial process . . . ." *United Mine Workers of America* v. *Morris,* Ky., 307 S. W. 2d 763, 766 (1957). Judicial consistency must be observed in order to maintain a responsible and efficient court system.

The opinion of the Court of Appeals is reversed, and the judgments of conviction for all three respondents are affirmed.

All concur.

APPENDIX E

OPINION RENDERED: NOVEMBER 20, 1979

SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

v.

JEROME BLAIR
RICHARD CARPENTER and
STEPHEN BORDERS

File No. 78-SC-365-DG

Appeal from Jefferson Circuit Court
Action No. 156577

MANDATE

The Court being sufficiently advised, it is therefore considered that the decision of the Court of Appeals is reversed, and the judgments of conviction for all three respondents are affirmed; which is ordered to be certified to said court.

February 12, 1980 Respondents' Petition for Rehearing Denied.

A Copy—Attest:
(s) Rose Tomlinson, D. C.
John C. Scott, Clerk

Issued 2/12/80

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